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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LISSA BROWN, Individually and as Administrator, etc., Plaintiff and Appellant, v. ATLAS-KONA KAI, INC., Defendant and Respondent.	D052942 (Super. Ct. No. GIC877052)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Michael Ponczocha collapsed in the hallway of the health club operated by Atlas-Kona Kai, Inc. (Kona Kai), on the afternoon of March 27, 2006, and died of cardiac arrest one-hour and 20 minutes later. His widow, Lissa Brown, appeals from summary judgment entered in favor of Kona Kai in her action for wrongful

death. Brown argues that the court erred in ruling that Kona Kai's duty was limited to promptly summoning emergency services. She also contends that there is a triable issue whether Kona Kai called 911 within a reasonable time. We reject Brown's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

To address the question whether Kona Kai summoned emergency services promptly, the parties focus on the actions Kona Kai's staff took in the minutes following Ponczocha's collapse at approximately 5:25 p.m. In the trial court proceedings, they generally agreed on four points along that timeline. First, the front desk of the Kona Kai contacted 911 "[a]t or about 5:36 p.m." Second, health club member Allejandro Troncellito reported the incident to 911 after the front desk reported it. Third, when Troncellito reached the 911 operator, he could hear the siren from an approaching emergency vehicle. Fourth, the paramedics arrived at approximately 5:47 p.m. Kona Kai argued in its motion for summary judgment that these facts show it summoned help promptly as a matter of law.

Brown cited several additional facts in support of her argument that there was a delay of "at least" 11 minutes between Ponczocha's collapse and the call to 911 which raised a triable issue whether Kona Kai acted reasonably under the circumstances. Kona Kai disputed Brown's characterization of the length of the delay, arguing that the evidence indicated that there was "at most" an 11-minute

delay before 911 "retrieved" Kona Kai's call. Although Brown did not dispute the fact that two staff members initiated cardiopulmonary resuscitation (CPR) within a reasonable time, she offered evidence suggesting that one of those staff members did not know how to perform CPR. Brown also submitted the declaration of Anthony Abbott, Ed.D., a claimed expert on health and safety at fitness facilities. Dr. Abbott stated that Kona Kai "failed to meet its obligations to the public" by, among other things, not having an automated external defibrillator (AED) on site and not having an emergency response plan which included training staff on the use of the telephones. The trial court sustained Kona Kai's objections to most of Dr. Abbott's declaration. In a footnote attached to the end of her opposition to Kona Kai's summary judgment motion, Brown cited in support of her broad definition of duty the 2006 legislation requiring all health clubs to have AED's available along with staff trained in their use by July 1, 2007. (Health & Saf. Code, § 104113.)

In the order granting summary judgment in favor of Kona Kai, the trial court reiterated its earlier ruling denying Kona Kai's motion for judgment on the pleadings—that a business proprietor's duty is limited to " 'com[ing] to the aid of a sick or injured invitee by promptly summoning emergency services.' " The court acknowledged that what constitutes "a reasonable time" is generally a question of fact for the jury, but found as a matter of law that Kona Kai's employees

"immediately came to the aid of Mr. Ponczocha and summoned medical assistance."

DISCUSSION

I. *Standard of Review*

Summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) Once the defendant has met that burden, the burden shifts to plaintiff to show that "a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).) "A party cannot avoid summary judgment based on mere speculation and conjecture [citation], but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.)

We review the trial court's decision granting summary judgment de novo (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)), applying the same three-step analysis required of the trial court (*Bono v. Clark* (2002)

103 Cal.App.4th 1409, 1431-1432). After identifying the issues framed by the pleadings, we determine whether the moving party has negated the opponent's claims, then decide whether the opposition has demonstrated the existence of a triable, material factual issue. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) We strictly construe the moving party's evidence and liberally construe the opposing party's evidence (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838-839) and may not weigh the evidence or conflicting inferences (*Aguilar*, at p. 856; Code Civ. Proc., § 437c, subd. (c)). A triable issue of material fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Aguilar*, at p. 850.)

Our independent review is not limited to the question whether there is a triable issue of material fact justifying trial on the merits. Because the question whether defendant owes the plaintiff a duty of care is one of law to be decided by the court, it is amenable to resolution by summary judgment. (*Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 331 (*Rostai*).)

II. *Kona Kai's Duty of Care*

We begin by addressing the scope of Kona Kai's duty of care. Brown argues that the trial court erred in narrowly defining Kona Kai's duty. She acknowledges *Rotolo v. San Jose Sports and Entertainment, LLC* (2007)

151 Cal.App.4th 307, review den. Aug. 15, 2007 (*Rotolo*) and *Breaux v. Gino's, Inc.* (1984) 153 Cal.App.3d 379 (*Breaux*), two cases the trial court relied on, but nonetheless contends that Kona Kai's obligations extended beyond the duty to promptly call emergency services. Brown maintains that the operator of a health club also has a duty to have emergency equipment such as AED's on hand, and to train its staff on how to respond to foreseeable emergencies such as cardiac arrest. We turn first to Brown's complaint to determine the gist of her claims.

Brown's complaint alleges claims for negligence, premises liability and failure to warn. Specifically, she alleges that Kona Kai negligently managed and operated the health club "so as to cause and permit to exist unsafe conditions on and at said premises. Among other things, [Kona Kai] failed to have appropriate safety equipment at the premises, including a portable debrillator [*sic*], failed to instruct personnel in appropriate safety procedures and failed to have on staff persons reasonably knowledgeable about appropriate safety procedures. Moreover, [Kona Kai] [was] negligent in the selection, hiring, training and supervision of staff at said premises, which resulted in their being unable to adequately, reasonably and timely respond to an emergency involving Michael Ponczocha." Brown also alleges that Proczocha was injured "because of [Kona Kai's] failure to timely and reasonably render medical aid as well as [its] failure to timely and reasonably contact appropriate medical personnel to provide medical

care" and that "[s]aid conduct, acts and omissions further caused and contributed to" Ponczocha's death. Based on these allegations, we consider the duty of care required of property owners in general and operators of health clubs in particular.

"Although the general rule of nonliability is that 'no one is required to save another from a danger which is not of his making' [citations], courts have recognized exceptions to this rule where there is some 'special relationship' between the parties, giving rise to a duty to act." (*Rotolo*, *supra*, 151 Cal.App.4th at p. 325.) A special relationship exists between a property owner or manager and invitees, including business patrons. (*Ibid*.) In the context of premises liability, the special relationship gives rise to a duty to maintain the premises in a reasonably safe condition and may give rise to the obligation to take affirmative measures "either to prevent foreseeable harm from occurring to those using the premises, or to come to the aid of a patron or invitee in the face of ongoing or imminent harm or danger." (*Id*. at p. 326, citing *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235-238.)

Other rules define the scope of duty where, as here, the defendant is also the operator of a sports facility. As long as the defendant owner or operator uses due care not to increase the risks inherent in the sport, the injured plaintiff is barred from any recovery under the doctrine of primary assumption of risk. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314-316; *Rostai*, *supra,* 138 Cal.App.4th at pp. 330-

331, 335.) *Rostai* affirmed summary judgment in favor of a gym owner and a personal trainer where plaintiff Rostai suffered a heart attack near the end of his first training session. (*Rostai,* at p. 329.) He had alleged that the defendants knew he was overweight and not physically fit and had a duty to investigate his health history, including his current physical condition and cardiac risk factors. (*Ibid*.) The court rejected Rostai's argument that assumption of risk did not apply because fitness training was not a sport, ruling that the doctrine applied "to any physical activity that involves an element of risk or danger as an integral part of the activity." (*Id*. at pp. 330, 333.)

Brown attempts to avoid the bar of assumption of risk by arguing that Kona Kai's duty is defined by what it was required to do *in response* to the imminent harm or danger occasioned by Proczocha's collapse in the hallway of the health club. The flaw in Brown's reasoning is that the actions she argues a health club is required to take must be in place before an emergency such as cardiac arrest arises; otherwise, they are not effective. Thus, to the extent Brown alleges Kona Kai failed to make the health club a reasonably safe place to pursue his fitness training, her claim is barred by primary assumption of risk. (*Rostai, supra,* 138 Cal.App.4th at pp. 330-331, 335.) Brown does not and cannot claim Kona Kai's failure to install AED's or have emergency plans in place increased the risk of harm Proczocha was exposed to while exercising at club.

We conclude that Kona Kai's duty as operator of the health club was simply to call for help. *Breaux* and *Rotolo* support our conclusion. In *Breaux*, plaintiff's wife choked while eating at a restaurant owned and operated by Gino's, Inc., and later died. On Gino's motion for summary judgment, the undisputed facts showed that the restaurant's assistant manager called an ambulance as soon as he was aware that the decedent was in distress. No one attempted to provide first aid to the decedent, who was alive when the ambulance arrived. The facts also showed that Gino's complied with California statutory law by posting state-approved instructions on first aid for choking victims. The statute provided immunity from liability to anyone who followed those instructions in assisting a choking victim. (*Breaux*, *supra*, 153 Cal.App.3d at p. 381.) *Breaux* discussed the extent of the restaurant's duty for nonfeasance, that is, the physical acts restaurants are required to perform to assist customers who need medical attention. (*Id*. at p. 382.) The court determined that given Gino's compliance with the statute, the restaurant met its legal duty to the decedent when it summoned medical assistance within a reasonable time. It affirmed summary judgment in favor of Gino's. (*Id.* at p. 382.)

Like the case before us, *Rotolo* considered the duty owed by the operator of a sports facility to an invitee who suffered cardiac arrest on the premises. It rejected plaintiffs' effort to expand the duty imposed on operators of sports facilities. Parents sued the operators the facility for wrongful death after their

teenage son died of cardiac arrest while participating in an ice hockey game. They alleged that defendants had a duty to notify users of the facility of the existence and location of an AED on the premises. The parents also claimed that the timely use of the AED would have greatly increased the chances of their son's survival. (*Rotolo*, *supra*, 151 Cal.App.4th at p. 313.) The trial court sustained defendants' demurrer without leave to amend, finding no common law duty "beyond a duty to timely summon emergency services, which defendants fulfilled." (*Ibid.*) The appellate court affirmed on several grounds. (*Id*. at pp. 314, 340.) First, it reasoned that the Legislature occupied the field by enacting statutes that governed the acquisition and use of AED's but did not impose an affirmative duty on building owners and managers to acquire AED's in the first instance. (*Id*. at p. 314.) Second, it noted that those who elect to participate in a sport assume the primary risk of injury inherent in that sport. (*Id*. at p. 315.) Third, and most important for our purposes, the court declined "to create a legal duty that [was] nowhere defined in the statutes or in common law . . . ." (*Ibid*.) It considered the well-established factors that inform the policy decision to impose a duty of care (*id*. at pp. 336-337, citing *Rowland v. Christian* (1968) 69 Cal.2d 108), and acknowledged that "it would be advisable and helpful for operators of sports facilities to develop an emergency plan that includes notice to users of the facility of the availability of lifesaving devices on the premises." (*Rotolo*, at p. 315.) At

the same time, the court observed that the parents' argument failed to account for the limitations on the duty imposed on the operator of a sports facility under the doctrine of assumption of risk articulated in *Knight v. Jewett*, *supra*, 3 Cal.4th at pages 315-316, or the limitations on the duty of a business proprietor to provide assistance to a patron experiencing a medical emergency described in *Breaux*, *supra*, 153 Cal.App.3d at page 382. (*Rotolo*, at p. 337.) The California Supreme Court denied review. We therefore decline to expand Kona Kai's duty beyond that of promptly summoning emergency services.

III. *The Reasonableness of Kona Kai's Actions*

Brown contends that even under the narrow definition of duty set forth in *Rotolo* and *Breaux* there is a triable issue whether Kona Kai summoned emergency assistance promptly, that is, whether it acted reasonably under the circumstances. As the trial court acknowledged, reasonableness in the exercise of the duty of care is ordinarily decided by the trier of fact. (*Phoenix Assurance Co. v. Texas Holding Co*. (1927) 81 Cal.App. 61, 74.) In this case, however, we agree with Kona Kai that the evidence would permit a reasonable jury to find Kona Kai acted reasonably and promptly as a matter of law. The record does not reveal the exact time Kona Kai's staff discovered Ponczocha collapsed in the hallway of the health club. It was sometime "close to," "around," 5:25. p.m. Troncellito reached 911 after the front desk reported the incident "at or about" 5:36 p.m. Troncellito heard the sirens

coming from Pt. Loma at the same time the 911 operator answered. Meanwhile, Kona Kai's staff was administering CPR to Proczocha. On this record, we conclude as a matter of law that Brown failed to sustain her burden to demonstrate the existence of a triable issue regarding the reasonableness of Kona Kai's efforts to summon emergency services. (Code Civ. Proc., § 437c, subd. (p)(2).)

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.